

No.
LOWER CANADA.

In the Queen's Bench.

APPEAL SIDE.

ALBA WYMAN,

Plaintiff in the Court below,

APPELLANT,

ALEXANDER EDSON,

Defendant in the Court below,

RESPONDENT.

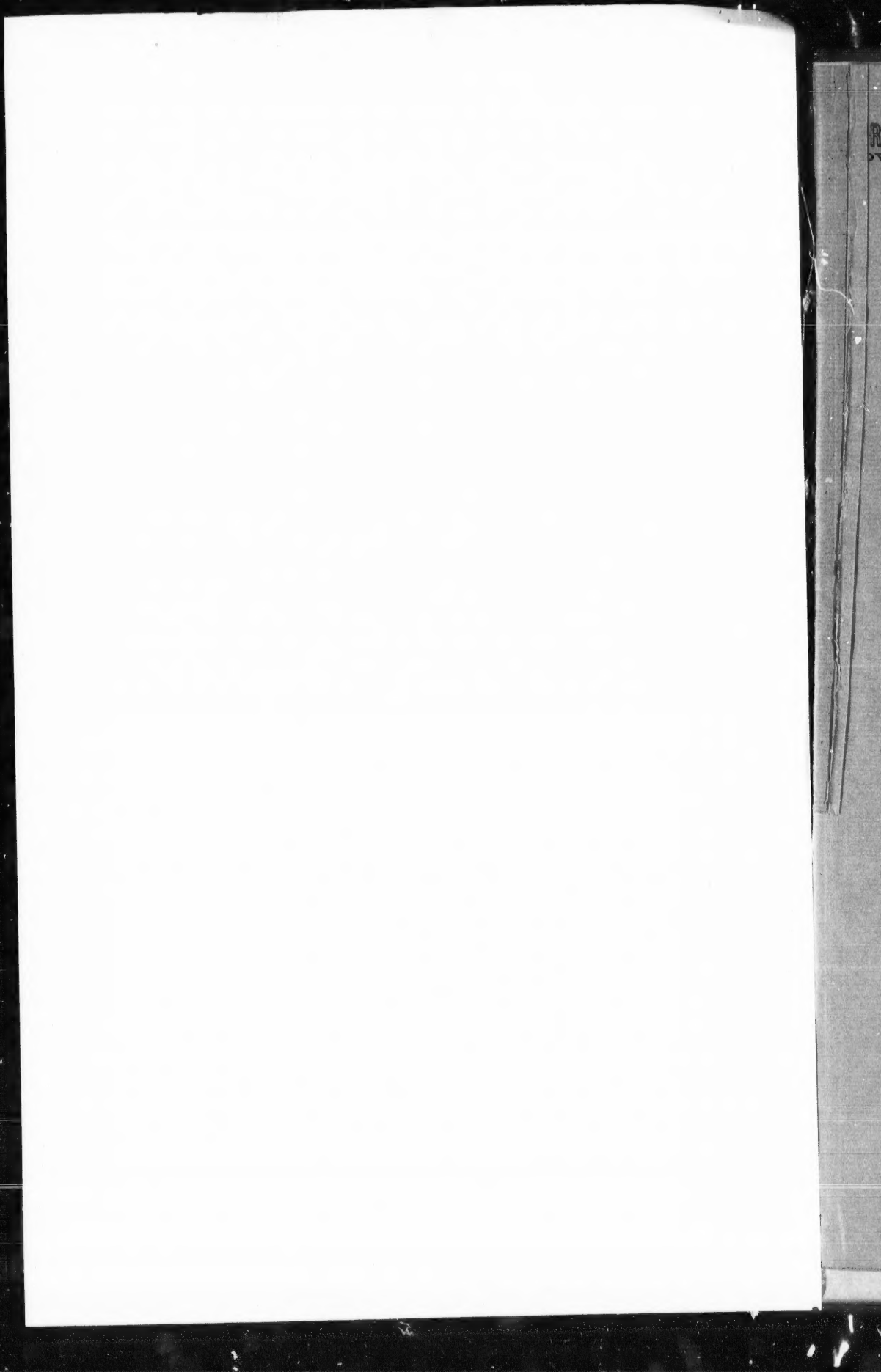
APPELLANT'S CASE.

No reply case filed

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APPELLANT'S FACTUM.

This was an action in the Circuit Court, Stanstead. The *demande* was for damages, £50, for unlawfully taking away a quantity of manure and certain fixtures from a certain parcel of land being north half of south half of lot 4, in second range Barnston, of which appellant was proprietor. Appellant bought the land in question of respondent 25th October, 1856. Notarial copy of deed filed. Respondent, by verbal understanding, remained in occupation till ensuing spring, when he left. On leaving, respondent removed all the manure accumulated on the farm prior to the deed, as well as the manure made by his own stock during the winter subsequent to the deed. The judgment of the Honourable Edward Short in the Circuit Court at Stanstead, on 4th May, 1859, rejected appellant's *demande* so far as the same related to the manure—old as well as new—and simply gave judgment for the value of a sink attached to the farm house removed by respondent. The judgment is in the following terms:

"The Court having, &c., doth adjudge and condemn said defendant to pay to said plaintiff seven shillings and sixpence currency for his damages, occasioned by the taking away and removal by defendant of a sink belonging to said plaintiff, attached to the farm house and premises mentioned and described in plaintiff's declaration in this cause filed, with interest and costs of suit. As to the rest of Plaintiff's *demande*, the Court doth hereby dismiss the same considering that the old manure, namely, that made on the premises prior to the purchase thereof by said plaintiff, was taken away by defendant with the permission and consent of said plaintiff; that the new manure, namely, that made after the said purchase, being the produce of the cattle and stock of said defendant, the said plaintiff had no right or title to whatsoever; and that said plaintiff has failed to establish by legal evidence any of the wrongs complained of in his said declaration save the taking away of the sink aforesaid."

This appeal involves several questions.

1. Did the manure upon the farm in question, when conveyed by respondent to appellant, pass with the realty?

2. If the above question be answered in the affirmative, could any contract to release this manure, being of value above 100 livres, be proved by parol evidence alone?

3. If the vendor remains upon the farm sold during the ensuing winter, after execution of deed, without rent, to feed out to his own stock the hay grown upon the place, does not the manure become, and is it not presumed in law to be the property of the proprietor of the farm?

If the first two of the foregoing questions deserves to be answered in the affirmative then the judgment is erroneous in so far as relates to the old manure. If the last question be affirmed, the judgment is erroneous as to the new manure; and if the three questions be all answered in the affirmative, the Plaintiff in the Court below was entitled to a judgment according to his *demande*.

The respondent's plea to the action was simply the general issue. The appellant maintains that by law the old manure pertained to the realty, and was acquired by the deed of conveyance of the land.

Merlin, Rep. mot "Fumiers" "Les fumiers, considérés par rapport au propriétaire, sont réputés immeubles, et font partie du fonds, avant même qu'ils y soient transportés dans les terres, et à plus forte raison des qu'ils sont portés, quoi qu'ils ne soient pas encore répandus."

"Les fumiers appartiennent à celui qui est héritier ou légataire du fonds dans lequel ils se trouvent. Ils sont aussi compris dans la vente du fonds." Idem Guiot's Répertoire. Mot "Fumiers."

The old manure having been acquired by the deed, nothing short of a contract equally formal could alienate it from appellant to respondent. Respondent has adduced evidence to render it probable that appellant told him he might take the old manure. On examining the evidence as a whole on this point, the Court will perceive that appellant always claimed the old manure as well as the new, but somehow got the impression that as it was not mentioned in his deed he could not retain it by law, and so probably expressed himself, without any intention of giving away the manure. The evidence, however, as proving a contract, appellant maintains should have been rejected as parol evidence of a contract above 100 livres without commencement de preuve par écrit, as parole proof of matters pertaining to conveyance of real property requiring written evidence, and as irrelevant to the issue, there being no special plea in avoidance.

The appellant maintains that the new manure made by respondent on the farm in the winter subsequent to the deed, belonged to the farm *par destination*, and were not this the law, that the manner in which respondent occupied "to feed out the hay on the place," as some of the witnesses speak of it, and without being subject to any charge for rent, shows that it was understood between appellant and respondent that the manure made should be left for the benefit of the farm.

Traploug, L'Echange et Louage, No. 666. "Ainsi, les pailles et les fumiers, étant destinées à l'engrais des terres, font partie de l'héritage. "Selon l'usage dit coquille, les pailles et fourrages sont destinés pour faire valoir le domaine." Ils ne peuvent être divertis de la ferme, sans que le preneur ne s'expose à de graves reproches pour avoir enlevé à ces choses leur destination." Idem No. 780. Idem No. 782.

Quand même le fermier sortant n'aurait pas reçu les pailles et engrais, il doit cependant les laisser à sa sortie sauf au propriétaire à lui en payer le prix. Ici l'intérêt de l'agriculture l'emporte sur le droit de propriété," &c., &c. Idem No. 1232. Pothier, Contrat de Louage, No. 190.

"Il (le fermier) lui est expressément défendu de diverter aucun fumier et aucunes pailles de la métairie, tous les fumiers et toutes les pailles étant destinés à l'engrais des terres." Merlin Ques. de Droit Mot "Fumiers."

Question 2nd. Here is quoted an *arrêt du Parlement de Paris*, in which it was determined *en dernier ressort* that the outgoing tenant was bound not only to leave the manure but was also bound to leave for the benefit of the farm, the *pailles*, straw, chaff, and the like from which manure is made.

SANBORN & BROOKS,

Attorneys for Appellant.

Dated 24th May, 1859.

EXTRACTS OF EVIDENCE.

Burton Libbee—Appellant's witness: "Defendant told me plaintiff had forbade him to draw away the manure, and had said it belonged to him, plaintiff." . . . "I think there must have been eighty-five loads of old manure on the farm." . . . "There must have been forty loads of manure made last winter". (Winter of 1856-7.)

David Smith—Appellant's witness: "Defendant told me that plaintiff claimed the manure on the farm."

William Bailey—Appellant's witness: "Defendant told me that plaintiff claimed the manure as belonging to him when he, defendant, began to draw it away."

George Gale—Appellant's witness: "The understanding between plaintiff and defendant was that defendant might if he pleased remain in the house and feed out to his cattle on the farm the hay and grain which he had there from the time of the sale until May then next, and was to leave the manure on the farm for plaintiff's benefit."

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